SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 96

W. I. BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS

vs.

ISADORE LUVISCH

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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1 In United States Circuit Court of Appeals, Eighth Circuit

No. 6125.—May Term, 1923

W. I. BIDDLE, WARDEN OF THE UNITED STATES Penitentiary at Leavenworth, Kansas, appellant vs. ISADORE LUVISCH, APPELLEE	Appeal from the District Court of the United States for the District of Kansas

Certificate to the Supreme Court of the United States

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that the record on an appeal now pending before it, discloses the following:

The appellee had been indicted in the District Court of the United States for the Eastern District of Michigan in three counts, to which he entered a plea of guilty, and thereupon was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for five years. While in prison he applied to the District Court of the United States for the District of Kansas for a writ of habeas corpus, and upon a hearing of the petition a judgment was entered discharging him from imprisonment on the ground that none of the three counts in the said indictment to which he had entered a plea of guilty and was sentenced, constituted a violation of any law of the United States. Each of the three counts is based upon the same facts, except that the first count charges the making of a plate to be in the likeness and similitude of certain plates designed by the Dominion of Canada, a foreign government, for the printing of the genuine issues of certain obligations and securities of said Government. The second count charges him with possession of that plate, and the third count charges him with the sale of 1,200 counterfeit prints from said plate in the likeness and similitude of the genuine obligations and securities of that foreign Government. The

2 description of these securities and obligations of the Dominion of Canada is set out in each count, and for this reason we deem it only necessary to set out the first count of the indictment, which differs from the other counts only as stated. That count, omitting the jurisdictional allegations, charges that the defendant "did then and there unlawfully, wilfully, feloniously and knowingly, and without lawful authority, cause and procure to be made and engraved a certain zinc half-tone plate in the likeness and similitude of certain plates and impressions designated by a certain foreign government, to wit, the Dominion of Canada, for the printing of the genuine issues of certain obligations and securities of the said foriegn government, to wit, certain inland excise stamps of the denomination of one cent, bearing the following words and figures, to wit: The numerals '1912' at each end and in the center of said stamp, and the words 'Certified manufactured in the year'; and the signature of, to wit, 'J. W. Vincent,' and a large scroll numeral

'1,' all on the left side of the center of said stamp, and in the center thereof the word 'Ottawa' above the numerals '1912,' and beneath said numerals the word 'Canada,' and on the right of the center of said stamp appears first the word 'cent' and then 'bottled in bond under excise supervision, Deputy Minr. Inland Revenue.'"

It is further certified that the following question of law is presented by the appeal prosecuted by the warden of said penitentiary, the respondent in the court below, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon it:

Do the counts of the indictment, or any of them, charge the commission of a criminal offense against the United States as in violation of sections 147 and 161 of the act of March 4, 1909 (35 Stat. 1088) known as the Penal Code of 1910?

ROBT. E. LEWIS,
U. S. Circuit Judge.
JACOB FISCHER,
U. S. District Judge.
WILBUR F. BOOTH,
U. S. District Judge.

[File endorsement omitted.]

3 In United States Circuit Court of Appeals, Eighth Circuit

Clerk's certificate

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of W. I. Biddle, warden of the United States Penitentiary at Leavenworth, Kansas, appellant, vs. Isadore Luvisch, No. 6125, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Paul, Minnesota, in the Eighth Circuit, this nineteenth day of June, A. D. 1923.

[SEAL.] E. E. KOCH,
Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit.

[File indorsement omitted.]

(Indorsement on cover:) File No. 29703. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 96. W. I. Biddle, warden of the United States Penitentiary at Leavenworth, Kansas, vs. Isadore Luvisch. (Certificate.) Filed June 25th, 1923. File No. 29703.

○

In the Supreme Court of the United States

OCTOBER TERM, 1924

W. I. BIDDLE, WARDEN
v.
ISIDORE LUVISCH
No. 96

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF ON BEHALF OF THE WARDEN

STATEMENT

Defendant entered a plea of guilty to an indictment charging, so far as is pertinent here, that he (R. p. 1)—

> did then and there unlawfully, wilfully, feloniously and knowingly, and without lawful authority, cause and procure to be made and engraved a certain zinc half-tone plate in the likeness and similitude of certain plates and impressions designated by a certain foreign government, to wit, the Dominion of Canada, for the printing of the genuine issues of certain obligations and securities of the said foreign government, to wit, certain inland excise stamps of the denomination of one cent, bearing the following words and figures, to

> wit: The numerals '1912' at each end and in the center of said stamp, and the words 'Certified manufactured in the year'; and the signature of, to wit, 'J. W. Vincent,' and a large scroll numeral '1', all on the left side of the center of said stamp, and in the center thereof the word 'Ottawa' above the numerals '1912,' and beneath said numerals the word 'Canada,' and on the right of the center of said stamp appears first the word 'cent' and then 'bottled in bond under excise supervision Deputy Minr. Inland Revenue.'

He was thereupon sentenced to serve five years' imprisonment in the United States Penitentiary at Leavenworth, Kansas. After he had entered upon the execution of his sentence he sued out a writ of *habeas corpus* attacking the indictment. The trial court ordered his discharge and the case was then taken to the Circuit Court of Appeals for review. That court rendered an opinion, one judge dissenting reversing the judgment of the trial court. The majority and minority opinion are reported in 287 Fed. 699. For some reason not appearing in the record, the opinions were set aside, and the following question certified to this court (R. p. 2):

> Do the counts of the indictment, or any of them, charge the commission of a criminal offense against the United States as in violation of sections 147 and 161 of the act of March 4, 1909 (35 Stat. 1088), known as the Penal Code of 1910?

ARGUMENT

The answer of this court to the question of the Circuit Court of Appeals should be to the effect that on habeas corpus the indictment here involved states an offense under the laws of the United States

The question certified to this court, viz., whether the indictment states an offense against the United States, is plainly one which orderly procedure required the defendant to submit to the trial court, and if dissatisfied with its ruling, to seek a review in the Circuit Court of Appeals on writ of error. He refused to do this, however, entered a plea of guilty, and undertook to reserve the question for subsequent determination on *habeas corpus*. This court on numerous occasions has emphatically ruled that *habeas corpus* may not be so utilized. *Matter of Gregory*, 219 U. S. 210, 213, is in point. The question there presented was stated and disposed of in the following language:

> The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding can not be made to perform the function of a writ of error, and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime—that is to say, whether the court properly applied the law—if it be found that the court had jurisdiction to try the issues and to render the judgment. *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651; *In re Coy*, 127

U. S. 731; *Gonzales* v. *Cunningham*, 164 U. S. 612; *In re Eckart*, 166 U. S. 481; *Storti* v. *Massachusetts*, 183 U. S. 138; *Dimmick* v. *Tompkins*, 194 U. S. 540; *Hyde* v. *Shine*, 199 U. S. 62, 83; *Whitney* v. *Dick*, 202 U. S. 132, 136; *Kaizo* v. *Henry*, 211 U. S. 146, 148. This rule has recently been applied in a case where it was contended in a *habeas corpus* proceeding that the record should be examined to determine whether there was any testimony to support the accusation. And this court, affirming the judgment which discharged the writ, said by Mr. Justice Day: "The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of *habeas corpus*. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions." *Harlan* v. *McGourin*, 218 U. S. 442.

And at again pages 217 and 218 of the opinion:

> Given a valid enactment, the question (assuming it to be one demanding judicial examination) whether a particular case falls within the prohibition is for the determination of the court to which has been confided jurisdiction over the class of offenses to which the statute relates.

> As said by Chief Justice Marshall in *Ex parte Watkins*, 3 Pet. 193, on p. 203: "The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it." And in *Ex parte Parks*, 93 U. S. 18, on page 20, the court said: "Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States), is a question which has to be met at almost every stage of criminal proceedings; on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question."

A further exposition of the limited scope of *habeas corpus* was made in *Glasgow* v. *Moyer*, 225 U. S. 420, 429, wherein it was said:

> The principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense. Those questions, like others, the court is invested with jurisdiction to try if

raised, and its decision can be reviewed, like its decisions upon other questions, by writ of error. The principle of the cases is the simple one that if a court has jurisdiction of the case the writ of *habeas corpus* cannot be employed to re-try the issues, whether of law, constitutional or other, or of fact.

* * * * *

Having remitted him to a writ of error as a remedy, it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus*. The ground of the decision was that there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defenses of fact and law, whether they attacked the indictment for insufficiency or the validity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals. It certainly cannot be said that the District Court of Delaware did not have jurisdiction of the case, including those defenses, or that its rulings could not have been reviewed by the Circuit Court of Appeals or by this court by writ of error. It would introduce confusion in the administration of justice if the defenses which might have been made in an action could be reserved as grounds of attack upon the judgment after the trial and verdict.

In *Toy Toy* v. *Hopkins*, 212 U. S. 542, 548, the petition for the writ alleged facts which it was claimed disclosed not only lack of jurisdiction of the subject

matter set forth in the indictment, but also lack of jurisdiction of the person. In affirming the judgment below denying the writ, this court said (p. 548):

> If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which on the merits we do not hold, the Circuit Court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and *habeas corpus* can not be availed of as a writ of error.

See also *Ex parte Parks*, 93 U. S. 18, 20, where this court refused to determine on *habeas corpus* whether the forged document described in the indictment was covered by the statutes drawn in question.

The case of *Louie* v. *United States*, 254 U. S. 548, 551, while not a *habeas corpus* case, seems to fully support the view that the question whether the excise stamp here involved is an obligation or security of the Dominion of Canada, is not jurisdictional, and therefore not open to review on *habeas corpus*.

As further showing the insistence of this court that convicted defendants may not disregard the usual procedure for review in criminal cases, viz, by writ of error, and seek review by the short route of *habeas corpus*, see *Riddle* v. *Dyche*, 262 U. S. 333, 335.

For the purpose of the present case, it would seem to make no difference under *Matter of Gregory*, 219 U. S. 210, whether the excise stamps involved must be tested by our laws or the laws of Canada. In

either case it would appear to be necessary to first determine the function and characteristics of such a stamp as a condition precedent to deciding whether it was or was not an obligation or security. Section 161 of the Criminal Code of the United States, which defines the offense, reads as follows:

> Whoever, within the United States or any place subject to the jurisdiction thereof, except by lawful authority, shall have control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, or shall use such plate, stone, or other thing, or knowingly permit or suffer the same to be used in counterfeiting such foreign obligations, or any part thereof; or whoever shall make or engrave, or cause or procure to be made or engraved, or shall assist in making or engraving, any plate, stone, or other thing, in the likeness or similitude of any plate, stone, or other thing designated for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation; or whoever shall print, photograph, or in any other manner make, execute, or sell, or cause to be printed, photographed, made, executed, or sold, or shall aid in printing, photographing, making, executing, or selling, any engraving, photograph, print, or impression in the likeness of any genuine note, bond, obligation, or other security, or any part thereof, of any

> foreign government, bank, or corporation; or whoever shall bring into the United States or any place subject to the jurisdiction thereof, any counterfeit plate, stone, or other thing, or engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank, or corporation, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

The suggestion that as Congress by Section 147 of the Criminal Code specifically included stamps in the words "obligations or securities of the United States," and omitted stamps from Section 161 of said code, this shows a legislative intent not to include stamps as foreign obligations or securities, is untenable, for on the same principle it would be necessary to exclude from Section 161 the other instruments named in Section 147, which are clearly obligations or securities. The only purpose of Section 147 was to make sure that the instruments named therein were included in the words "obligation or other security," by those who should thereafter be called upon to enforce the statute. It is no authority for restricting the language in Section 161 of the Criminal Code, supra. In other words, Section 161 is to be interpreted as though Section 147 had not been enacted. The very language of Section 147, supra, seems to compel this conclusion. It reads as follows:

> The words "obligation or other security of the United States" shall be held to mean

all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representations of value, of whatever denomination, which have been or may be issued under any act of Congress.

Pertinent here is the Act of March 3, 1923, Chap. 218, 42 Stat. 1437, reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That nothing in sections 161, 172, and 220 of the Act entitled 'An Act to codify, revise, and amend the penal laws of the United States,' approved March 4, 1909 (Thirty-fifth Statutes at Large, at pages 1118, 1121, and 1132), shall be construed to forbid or prevent the printing or publishing of illustrations in black and white of foreign postage or revenue stamps from plates so defaced as to indicate that the illustrations are not adapted or intended for use as stamps, or to prevent or forbid the making of necessary plates therefor for use in philatelic or historical articles, books, journals, or albums, or the circulars of legitimate publishers or dealers in such stamps, books, journals, or albums. Nothing in said sections shall be construed to forbid or prevent similar illustrations, in black and white only, in philatelic or historical articles, books, journals, albums, or the circulars of legitimate publishers or

> dealers in such stamps, books, journals, albums, or circulars, of such portion of the border of a stamp of the United States as may be necessary to show minor differences in the stamp so illustrated, but all such illustrations shall be at least four times as large as the portion of the original United States stamp so illustrated.

This statute must be taken to mean, in any event, that there had been no prior legislative intent to withhold revenue stamps from the application of Section 161 if the language there used was otherwise capable of embracing such stamps.

We come then to consider the status of revenue stamps under the laws of Canada.

Section 546, Criminal Code of Canada, 1906, Amendments 1907–1916, p. 146, under the heading of "Offences Relating to Bank Notes, Coin and Counterfeit Money," provides, so far as here pertinent, as follows:

In this Part, unless the context otherwise requires,—

* * * * *

> (f) 'counterfeit token of value' means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which although genuine has no value as money. 55–56 V., c. 29, s. 460; 63–64 V., c. 46, s. 3.

Section 2, par. 40, of the same Code, pp. 1 and 6, provides as follows:

In this Act, unless the context otherwise requires,—

* * * * *

(40) 'valuable security' includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britain or Ireland, or of any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods wheresoever such lands or goods are situate, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal;

The foregoing seems sufficient to disclose the difficulty of attempting to determine on *habeas corpus*

the question of fact here involved, viz, whether under the laws of Canada inland excise stamps are obligations or securities of that country. *Church* v. *Hubbart*, 2 Cranch 187, 235, and *Ennis* v. *Smith*, 14 How. 400, 427. In any event the burden would seem to rest upon the defendant to clearly demonstrate that the stamps involved are not such obligations or securities. On this aspect the case is closely analogous to *Ex parte Parks*, 93 U. S. 18, 20, in which this court in speaking of the instrument there involved, said:

> At all events, it is not clear and free from all doubt that the forgery is not within the terms of the statute.

This court held that the question was not open on *habeas corpus*.

In view of the foregoing it is respectfully submitted that this court should either refuse to answer the question certified because no duty rests upon the Circuit Court to solve it on the record before it, or the answer of this court should be that on *habeas corpus* the indictment charges an offense within the meaning of Section 161 of the Criminal Code.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

OCTOBER, 1924.

○

No. [illegible]

In the

Supreme Court of the United States

OCTOBER TERM, 1932.

W. I. BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS, APPELLANT,

VS.

ISADORE LUVISCH, APPELLEE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLEE'S BRIEF.

L. S. Hosmer,
Kansas City, Kansas,
Ringolsky, Freedman & Boatright,
I. J. Ringolsky,
M. L. Freedman,
Wm. G. Boatright,
All of Kansas City, Missouri,
Counsel for Appellee.

(29703)

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CITATIONS.

No. 96.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

W. I. BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS, APPELLANT,

VS.

ISADORE LUVISCH, APPELLEE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

The question submitted by the United States Circuit Court of Appeals, (Eighth Circuit), by its certificate to this court is as follows:

STATEMENT OF FACTS.

(a)

Isadore Luvisch, appellee, was indicted in the District Court of the United States for the Eastern Disrict

of Michigan, in three counts, to which he entered a plea of guilty and thereupon was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for five years. While in prison, he applied to the District Court of the United States for the District of Kansas, for a writ of habeas corpus and, upon a hearing of the petition, a judgment was entered discharging him from imprisonment on the ground that none of the three counts in the indictment, to which he entered a plea of guilty and was sentenced, constituted a violation of any law of the United States. The Government appealed from the judgment rendered by the United States District Court, Eighth Circuit. The Circuit Court of Appeals reversed the judgment discharging the petitioner and, on filing motion for a rehearing, same was sustained and judgment of reversal set aside.

(b)

The indictment, omitting jurisdictional matters, is as follows:

> "That heretofore, to-wit: On the 25th day of October, in the year of our Lord, one thousand nine hundred and twenty, at the City of Detroit, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court,
>
> Isador Luvisch, George Walt, Vincent Bow, Sam Leider and (Same) Weinberg, all late of the City of Detroit, aforesaid, and each of them, hereinafter called the defendants, did then and there unlawfully, wilfully, feloniously, and knowingly, and without lawful authority, cause and procure to the made and engraved a certain zinc

half tone plate in the likeness and similitude of certain plates and impressions designated by a certain foreign government, to-wit: The Dominion of Canada, for the printing of the genuine issues of certain obligations and securities of the said foreign government, to-wit: certain Inland Excise Stamps of the denomination of one cent, bearing the following words and figures to-wit: the numerals "1912" at each end and in the center of said stamp; and the words "Certified manufactured in the year"; and the signature of, to-wit: "J. W. Vincent," and a large scroll numeral "1," all on the left side of the center of said stamp, and in the center thereof the word "Ottawa" above the numerals "1912," and beneath said numerals the word "Canada," and on the right of the center of said stamp appears first the word "cent" and then "and bottled in bond under excise supervision, Deputy Minr. "Inland Revenue"; * * *

Second Count.

* * * on the 25th day of October, A. D. 1920, at the City of Detroit, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, the said Isador Luvisch, George Walt, Vincent Bow, Same Leider, and Sam Weinberg, all late of the City of Detroit aforesaid, and each of them hereinafter called the defendants, did then and there unlawfully, wilfully, feloniously and knowingly and without lawful authority have in their possession and custody and under their control, a certain plate, to-wit: a zinc half tone made in the likeness and similitude of certain plates and stamps designated for the printing of certain foreign obligations and securities, to-wit: Genuine Inland Excise Stamps of the denomination of one cent, bearing the numerals "1912" at each end and in the center of said stamp, the words "certified manu-

factured in the year," and the signature of to-wit: "J. W. Vincent," and a large scroll numeral "1," all on the left side of the center of said stamp, and in the center thereof, the word "Ottawa" above the numerals "1912," and beneath said numerals the word "Canada," and on the right of the center of said stamp appears first the word "cent" and then "and bottled in bond under excise supervision Deputy Minr "Inland Revenue" issued and authorized by a certain foreign government, to-wit: The Dominion of Canada, from and by means of which said plate the said obligation and securities above described, to-wit: one cent inland excise stamps might be printed; * * *

Third Count.

"That heretofore, to-wit: on the 25th day of October, A. D. 1920, at the City of Detroit, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, the said Isador Luvisch, George Walt, Vincent Bow, Sam Leider, and Sam Weinberg, all late of the City of Detroit aforesaid, and each of them, hereinafter called the defendants, did then and there unlawfully, wilfully, feloniously and knowingly and without lawful authority, sell a certain number of counterfeit prints, to-wit: twelve hundred, made in the likeness and (similitude) of a certain genuine obligation and security of a certain foreign government, to-wit: The Dominion of Canada, said prints being in the likeness and similitude of certain Inland Excise stamps of the said foreign government, to-wit: The Dominion of Canada, of the denomination of one cent, bearing the following words and figures, to-wit: the numerals "1912" at each end and in the center of said stamp: and the words "Certified manufac-

tured in the year"; and the signature of, to-wit: "J. W. Vincent," and a large scroll numeral "1" —all on the left side of the center of said stamp, and in the center thereof the word "Ottawa" above the numerals "1912" and beneath said numerals the word "Canada," and on the right of the center of said stamp appears first the word "cent" and then "and bottled in bond under excise supervision, Deputy Minr. "Inland Revenue";

* * * * * * * *

(c)

The question submitted by the Circuit Court of Appeals is as follows:

"Do the counts of the indictment, or any of them, charge the commission of a criminal offense against the United States as in violation of Sections 147 and 161 of the Act of March 4, 1909 (35 Stat. 1088) known as the Penal Code of 1910?"

As stated in the certificate of the Circuit Court of Appeals, it will be noticed that each of the three counts is based on the same facts and that it is only necessary to consider the first count. For, if it does not state facts constituting a crime under the laws of the United States, then neither of the other counts in the indictment do.

BRIEF AND ARGUMENT.

II.

Sections of statutes referred in certificate and extracts from opinions of courts answering question submitted to this court.

(a)

Section 147 defines obligations and other securities of the United States. It says:

> "The words 'obligation or other security of the United States' shall be held to mean all * * * stamps and other representatives of value of whatever denomination, which have been or may be issued under any Act of Congress."

Section 161 reads as follows:

> "Whoever * * * shall have control, custody or possession of any plate * * * from which has been printed or may be printed any counterfeit note, bond, obligation or other security in whole or in part, of any foreign government, bank or corporation shall be guilty of a criminal offense."

The same section also makes it a criminal offense to make or engrave such a plate designed for the printing of genuine issues of the obligations of any foreign government, bank or corporation, or to print or, in any manner, make any print or impression "in the likeness of any genuine note, bond, obligation or other security or any part thereof of any foreign government, bank or corporation."

(b)

The Honorable John C. Pollock, Judge of the United States District Court for the District of Kansas, in passing on the question certified to this court on motion to dismiss in a memorandum opinion in part said:

> "The question presented on this application therefore is this: Is the paper or 'inland excise stamp' described in the several counts of the indictment, if genuine, as a matter of law such an obligation or security of the Dominion of Canada as is contemplated by the law-making power of the enactment of Section 161 of the Penal Code? If so, petitioner violated the law, by his plea of guilty confessed such violation, and is justly undergoing punishment. On the other hand, if the paper described in the indictment as an 'inland excise stamp' does not, if genuine, in any just sense, fall within the general classification made by the law-making power in the enactment of said Section 161, it then follows the act of defendant admitted by him to have been done by his plea of guilty entered, confessed no violation of the law for which there was any jurisdiction or power in the court to punish him, and he must be released.
>
> "Now, while the law-making power has in section 147 of the Code defined what constitutes an 'obligation or other security of the United States' the Congress has not attempted the making of any definition or classification of the obligations or securities of a foreign government for reasons perfectly obvious, leaving any such definition to be either gathered from the commonly accepted meaning of the terms employed or to be arbitrarily defined as the law-making power of such foreign government might desire to provide in its laws. This being true, I am inclined to the opinion at this time the paper described in the indictment as an 'in-

land excise stamp' constitutes in no just sense either an obligation or other security of the Dominion of Canada within the generally accepted meaning of these terms."

And again on the merits, in a memorandum opinion in part said:

"Do the inland excise stamps described in the indictment fall within the class of documents named in the statute as a 'note, bond, obligation or other security'? If this question related to an instrument of this government, the answer would be easy to find for the Congress has by law arbitrarily defined in what securities or obligations of this government consist, as follows:

"Section 147. The words 'obligation or other security of the United States' shall be held to mean all * * * stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress.

"However, the Congress has not attempted to define in what the 'notes, bonds, obligations or other securities' of foreign governments consist. Section 220 of the Penal Code was enacted for the purpose of making it an offense to counterfeit the postage stamps of a foreign government. The inland excise stamps described in the indictment cannot in any sense fall within that statute. Therefore, as there is no statutory definition of the term 'note, bond, obligation or other security' employed in section 161 of the Penal Code, and as a mere stamp or receipt does not in my judgment fall within the commonly accepted meaning of the term 'note, bond, obligation or other security' I am of the opinion the indictment alleges no public offense against petitioner as to either or any of its counts. While perhaps this court will not take judicial notice of the laws of a foreign country, and while it

was within the power of the Canadian Government by arbitrary law to have defined in what its 'notes, bond, obligations or other securities' should consist, a search of the laws of that country reveals no act making such arbitrary definition of such terms."

(c)

Judge Trieber, sitting as a Judge in the United States Circuit Court of Appeals, Eighth Circuit, in the majority opinion, of the court, which, as stated, was set aside, in part said:

"Section 147 does not attempt to define 'securities or obligations' of a foreign government, but only 'securities or obligations of the United States.' This section is therefore inapplicable to the indictment in the instant case. The indictment in express language charges that the Inland Excise Stamps described therein are 'obligations and securities' of the Dominion of Canada. What the laws of Canada declare these Inland Excise Stamps, which petitioner is charged with counterfeiting, we cannot judicially know, as the courts of the United States cannot take judicial notice of the laws of foreign nations, but they must be proved at the trial by competent evidence."

(d)

And Lewis, Circuit Judge in a dissenting opinion says (Italics ours):

"This is equivalent to putting the word 'stamps' into those sections defining the offense of counterfeiting obligations or other security of the United States. So far as we are advised, Congress has not declared it a crime to counterfeit or knowingly use counterfeited revenue stamps of any

foreign government. The indictment against the three petitioners for the writ goes on the assumption that the Inland Excise Stamp of the Dominion of Canada is 'an obligation or other security' of that country and charges that defendants counterfeited it; but the stamp is set out *and it shows on its face that it is not an obligation or security. This seems too clear for argument, is not denied by appellant, is sustained by authorities cited in appellee's brief, and is impliedly if not expressly conceded by my associates.* As I understand them, they in effect say that an inland excise stamp may have been made an obligation or other security of the Dominion by its laws, and if so, the prosecution would have been able to prove it on trial, and the plea of guilty admitted it. Granted all of this, I still dissent. For the proposition imports into the Congressional Act a foreign law (statutory or judicial decisions) as an element of the definition of the crime not found in the statute. We have, then, judgment and sentence of guilt of a statutory crime, the definition of which is found in part in the Congressional Act and in part in the laws of a foreign country. This seems to be demonstrated by other sections of Chapter 7, to which attention has been called, in this way: Other sections make it an offense to counterfeit an obligation or security of the United States. But Congress knew, as I think all must know, that an excise stamp is not a note, bond, obligation or other security; hence, it appreciated the necessity of declaring that an 'obligation or other security of the United States' means or includes stamps, in order to bring them within the definition of the crimes therein set out. Stamps, when issued under any Act of Congress, were thus made a subject-matter for counterfeiting, as much so as if they had been named in the sections defining the offenses. But the inclusion of stamps as an obligation or other security confined them to do-

mestic stamps. Not so with foreign stamps, they are not mentioned. They could have been expressly named in Section 161 as a part of the definition of the crime or it could have been declared by Congress that the words 'obligation or other security of any foreign government' shall be held to mean all stamps which have been or may be issued under its authority. Nothing of the kind was done, either expressly or by necessary implication. A contrary implication that Congress did not intend to include foreign stamps in the crime defined by Section 161 necessarily arises. The fallacy of resorting to the laws of a foreign country for the definition, in whole or in part, of a statutory crime seems to be obvious, and I do not agree that it may be done."

III.

The act charged in the indictment of counterfeiting the Inland Excise Stamp of the Dominion of Canada does not charge any offense against the laws of the United States, for the reason that said stamp is not an obligation or security of a Foreign Government and such act does not come within the purview of Section 161 of the Penal Code.

(a)

Obligation or Security of a Foreign Government Not Defined in Statute—

It is our contention that Section 161 does not make it an offense to counterfeit *an inland excise stamp of a foreign government.* The terms "obligation or other security, in whole or in part, of any foreign government" do not embrace or apply to a revenue stamp.

The charge here is that the petitioner counterfeited an inland excise stamp of the Canadian Government. Section 147 of the Penal Code defines the words "obligation or other security *of the United States*" to mean:

> "The words 'obligation or other security of the United States' shall be held to mean all * * * stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress" (This Section was formerly 5413 of Revised Statutes).

A moment's inspection will reveal that the arbitrary definition given in Section 147 is confined to the phrase "obligation or other security *of the United States.*" *There is no arbitrary definition anywhere in the Federal Statutes of an "obligation or other security of a foreign government."*

(b)

Rules of Construction—

It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly.

> *Aicardi* v. *Alabama,* 19 Wall (U. S.) 635.
> *Martin* v. *U. S.,* 168 Fed. 198.
> *U. S.* v. *Louisville,* 165 Fed. 936.
> *U. S.* v. 20 *Boxes of Corn Whiskey,* 133 Fed. 910.

A strict construction of a statute is a close adherence to the literal or textual interpretation and a case is excluded from its obligation unless the language of the statute includes it. The definition which is purely an arbitrary one, given in Section 147 to the words "obliga-

tion or other security *of the United States,"* will not be extended by the court to phrases other than the precise one to which the arbitrary definition is given. To do so would be to violate one of the best settled and most fundamental rules in the interpretation of statutes and especially penal statutes. The words "obligation or other security in whole or in part of any foreign government, bank or corporation" are to be interpreted according to the meaning, which those words *ordinarily have* and which has been conferred on them by numerous judicial decisions.

In the interpretation of statutes, words in common use are to be construed in their natural, plain and ordinary signification.

Lake County v. *Rollins,* 130 U. S. 662.
U. S. v. *Colorado Railroad Co.,* 157 Fed. 321.
Brun v. *Mann,* 151 Fed. 145.
Wadsworth v. *Boysen,* 148 Fed. 771.
Shulthis v. *MacDougal,* 162 Fed. 331.

Words and phrases used in the statutes and words as may have acquired a peculiar and appropriate meaning in the law, must be interpreted in accordance with their received meaning and acceptation.

U. S. v. *Jones,* 26 Fed. Cases. No. 15494.

Statutes are to be construed with reference to the principles of common law enforceable at the time of their passage and words used in a statute, which have a definite and settled meaning at common law are presumed to be employed in the same sense.

U. S. v. *Trans-Missouri Freight Association,* 58 Fed. 58.

The words "note, bond, obligation or other security of any foreign government," as appearing in Section 161, are to be construed and their meaning derived from ascertaining what those terms customarily mean under judicial decisions.

In accordance with the maxim *expressio unius est exclusio alterius,* where a statute enumerates the things upon which it is to operate or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned.

Johnson v. *Southern Pacific Co.,* 117 Fed. 462.

Oxford Iron Co. v. *Slafter,* 18 Fed. Cases No. 10637.

The arbitrary definition given to a certain phrase in Section 147 is not to be extended in its operation to *other phrases which are not the same,* but which may contain a word or words appearing in the phrase to which an arbitrary definition is given, unless there is something in the statute to expressly warrant.

By the rule of *ejusdem generis,* where general words following the enumeration of particular classes of things, the general words will be construed as applicable only to things of the same general nature or class, as those enumerated. The particular words are presumed to describe certain species and the general words to be used for the purpose of including other species of the same genus. Thus the words "or other security," following after the words "note, bond, obligation," simply

means instruments of the same general class as "notes, bonds or obligations."

U. S. v. *Irwin*, 26 Fed. Cases. No. 15445.

(c)

Meaning of Words "Obligation or Security"—Not "Stamps"—

The meaning of the words "obligation or other security, in whole or in part of any foreign government, bank or corporation," appearing in Section 161 is to be determined etymologically and from the judicial meaning of same. Webster defines the word "obligation" to mean "in law a bond to which a penalty is annexed on failure of due performance."

In 29 Cyc. 1308, an obligation is said to be "a binding or state of being bound in law; something which binds or obliges us to do or not to do some act; the chain of the law by which we are necessarily bound to make some payment according to the law of the land; an instrument in writing whereby a party is bound in law or bonds commonly called a writing obligatory."

In *Sinton* v. *County of Carter*, 23 Fed. 535 (District Court of Kentucky) it is said:

> "Obligation is a generic word and includes all kinds of *contracts* by which contracting parties bind themselves."

In *Blair* v. *Williams*, 4 Litt. (Kentucky) 35, it is said:

> "The term obligation, whether we consult its its etymology or its general acceptation in our own

> language will be found to signify a ligament, or tie, something which binds or obliges us to do or not to do some act. It is derived immediately from the Latin substantive *obligatio,* which is from the verb *ogligare;* to tie, to bind; to oblige; and is used in the same sense that the English words derived from these are universally used and received by all who either speak or write the English language."

In 35 Cyc. 1283, a security is said to be "written assurances for the return or payment of money; evidence of indebtedness."

> *Mace* v. *Buchanan,* 52 S. W. 505.
> *Jennings* v *Davis,* 31 Conn. 134.
> *Howard Savings Institution* v. *Newark,* 63 N. J. L. 547.
> *Thayer* v. *Walthen,* 44 S. W. 906.
> *Duncan* v. *Maryland,* 10 Gill and J. (Maryland) 299.

Webster defines the word "stamp" to be "an official mark on dutiable things."

The thing which is described in the indictment as an "obligation or security of a foreign government" is specifically set out and shows on its face and is so described in the indictment as being an inland excise stamp of the Dominion of Canada. The excise stamp purports to be just what its name says, to-wit, a receipt for the payment of money. The inland excise stamp is, in no just or proper sense, under the well defined meaning of the words "obligation or security," an obligation or security of a foreign government. This language obligation or security of a foreign government, appearing in

our statute, is to be construed with reference to the general system of law of which it forms a part and must, therefore, be interpreted in the light of our customary law.

What the words which are used in Section 161 mean are to be determined according to what those words mean in our language and under our laws, and they are to be construed in their ordinary and common acceptation, unless an intent to give them some other meaning expressly and clearly appears.

(d)

Instrument Must in Fact Purport to Bind—

In *U. S.* v. *Sprague,* 48 Fed. 828 (District Court of Wisconsin, per Dyer, J.) the question arose where a defendant was charged with having counterfeited an "obligation or security of the United States," which is the phrase which is defined in Section 147, as to whether or not the instrument, which he was charged with having counterfeited, must not have been, in fact, an instrument which, on its face, purported to be signed and executed by someone. The court says:

> *"The words 'obligation or other security' as herein used seem clearly to imply an executed instrument or at least one on its face purporting to be executed by somebody.* In the case at hand, the false or bogus bond bears no signature whatever. It is a mere blank so far as signatures or execution are concerned. Can it then be said to be an obligation or security or to be even a pretended obligation or security? True it is paper made after

the similitude of a United States bond, but it is unexecuted, unsigned by anybody. In that regard, as just observed, it is a blank and there is nothing on its face even a pretense of execution by any person or corporation. The statute was aimed at the issuance or execution, whether real or pretended, of obligations or securities made after the similitude of the obligations or securities of the United States; and I am constrained to believe that what is meant by the language of the section referred to is an instrument that is either in fact executed or purports to be executed by somebody; *otherwise it is not and does not purport to be an obligation.* * * *

"The instrument in evidence is not an obligation or other security, and does not purport to be such because it was never executed or signed by anybody and therefore, it is not such an instrument as the statute covers. In that respect it is no more than a blank piece of paper.

"* * * *Whether the instrument is an obligation or not is a question as to its legal effect.* That is a question for the court and if it is apparent that the alleged fraudulent obligation or security is not an obligation or security at all within the meaning of the statute, it must follow that the conviction cannot be sustained, although the jury have determined that the paper in evidence in its body and general form and style is made after the similitude of a United States bond."

Under the foregoing decision, it cannot be said that the inland excise stamp is any obligation or security (without reference to what its inherent characteristics are), but simply from the fact that it does not purport to be signed or executed by anybody. The foregoing decision is still the law.

In *Wiggins* v. *U. S.*, 214 Fed. 970, held that, in as much as the Act of 1892 relating to National Banks required each bank to keep on hand a deposit to redeem National Bank Notes, which had once been issued, *whether they were ever signed or not,* that, therefore where defendant was charged with having violated Section 150 of the Penal Code and had in his possession what purported to be a five dollar note of the National Bank currency issued by the National Bank of Beloit, Kansas, and made in the similitude of an obligation or security of the United States, although same was not signed, nevertheless came within the statute. The court cites the case of *U. S.* v. *Sprague, supra,* and other decisions to the effect that an unsigned instrument is not an obligation or security of the United States and places its ruling squarely on the proposition that, by the special act of Congress, as unsigned National Bank note has been made an obligation or security of the United States and can be redemmed.

(e)

War Saving Stamp Not An Obligation in Itself—

In *U. S.* v. *Rossi,* 268 Fed. 620 (District Court of Oregon), defendant was charged with having altered certain obligations and securities of the United States, to-wit: War Savings Certificates and War Savings Certificate Stamps. The court there held that the stamp was in no proper sense an obligation or security of the United States and only became so when it was attached

to the certificate, thus creating an obligation which could be enforced against the government.

The court says:

> "In the light of the act and department regulations provision is made for the issuance of two kinds of documents, namely War Savings Certificates and War Savings Certificate Stamps; but these documents become obligations of the United States *only* when a stamp or stamps shall have been affixed to the certificate and the name of the owner or owners shall have been written upon the certificate. Such certificates when so made up and completed, it may be confidently affirmed, are obligations or securities of the United States within the purview of Secs. 148, 151 and 154 of the Penal Code. *Separately considered, neither the stamp nor the certificate can be deemed such an obligation.*"

The foregoing decisions, relate to obligations and securities *of the United States,* but what is said in them and what they hold clearly shows that an obligation or security of a foreign government does not include an inland excise stamp. They hold that there must be an *obligation* of some kind.

(f)

Opinions Attorneys General—

We find no decisions defining the meaning of the words "obligation or other security in whole or in part of a foreign government bank or corporation." And we find no decisions deciding whether or not an inland excise stamp or a revenue stamp of a foreign govern-

ment is an obligation or other security of a foreign government.

The opinions of the attorneys general are very instructive. The opinions hereinafter quoted clearly hold that properly and generically a stamp is not an obligation or security of the United States and has only become so by virtue of the arbitrary definition placed on those words in Section 147. Moreover, they hold that Section 147 is not to be extended in its application to other sections of the Penal Code, wherein a part of the words defined in Section 147 appear. They also hold that a postage stamp of a foreign government is not an obligation or security of such foreign government.

(g)

Internal Revenue Stamps Not Obligation or Security—

In 14 Op. Atty. Gen. 528, in the communication addressed by George H. Williams, Attorney General to the Secretary of the Treasury, under date of February 15th, 1875, it is said:

> "In your communication of Feby. 1, 1875 you ask my opinion on this question: Whether in placing portraits of living persons upon internal revenue stamps there has been an infraction of that portion of the law (Revised Statutes, Sec. 3576) which declares that no portraits shall be placed upon any of the bonds, securities, notes, fractional or postal currency of the United States, while the original of such portrait is living.
>
> "Prior to the enactment of the Revised Statutes it was held, and, as I think rightly held, by the

Internal Revenue Bureau to be lawful to ornament with the effigies of living persons the stamps used by the Government in collecting its internal revenue. *These stamps are not bonds, notes or United States currency of any kind, nor yet are they in the ordinary or in any just sense United States securities.* Congress, however, in Section 5413 of the Revised Statutes has declared that the form of words 'obligation or other security of the United States' shall be held to include all representatives of value issued or to be issued by the Government and in the enumeration of the particulars which by the statutes are embraced by those words stamps are expressly included.

* * * * * *

"The form of words above quoted seems to have been chosen to denote generally the things the counterfeiting of which the acts sought to punish, and then by definition all the particulars are swept into it, stamps among the rest. *So then, for the purposes of the act only*—that is to punish the crime of counterfeiting or of falsely altering the paper issues (representatives of value) *of the United States*, and with cognate offenses. I do not find precisely the same form of words as that defined in Section 5413 in any other section (except those cited above) in the same division of the title 'Crimes' or indeed elsewhere in the Revised Statutes.

"These circumstances, viz., the connection in which the section defining the phrase is placed, the marks of quotation referring it to the particular section above cited, the subject matter of those sections, and the fact that the same form of words is not found except in those parts of the law which have to do with crimes, and particularly the crime of forgery, warrant the conclusion that beyond those parts of the Revised Statutes the wide significance given by Section 5413 to the words 'ob-

ligation or other security of the United States' does not extend. *It was not the intention of Congress except in those parts of the criminal law above indicated, to give the word* 'stamps' a meaning, *which neither its etymology nor its ordinary use warrants."*

(h)

No Stamp Is An Obligation or Security—

In 22 Op. of Atty. Gen. 40, is an opinion by Attorney General John W. Griggs addressed to the Postmaster General under date of Feby. 11, 1898, it is said in part:

"You having requested my opinion as to the law governing the engraving and printing of United States postage stamps and whether it is necessary for you to advertise for proposals for such work or to have it done at the Treasury Department, I have the honor to advise you as follows: * * *

"You advise me it has been contended that paragraph 4 of the Act making appropriations for sundry expenses of the Government for the fiscal year ending June 30, 1898 and for other purposes approved March 3, 1877, providing as follows: 'for labor and expense of engraving and printing namely: for * * * engraving and printing notes, bonds and other securities of the United States * * * provided, (1) the work be performed at the Treasury Department; and provided further that it can be done as cheaply, as perfectly and as safely, and all contracts already made shall be carried out' * * * applies to postage stamps and makes it necessary that the engraving and printing of them should be done at the Treasury Department.

"There is no language in the Act of 1877 which would include postage stamps unless it be the words 'other securities of the United States.'

"In the ordinary sense of the word and the sense in which it is used in this section of the law of 1877, *a security is evidence of public debt as a bond or certificate of deposit certificates of stock, etc.* In this sense postage stamps are not investments or securities.

"Reference is made to Section 5413 of the Revised Statutes which is as follows: The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national (bank) currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks or drafts for money drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any act of Congress.

"And is it contended that the definition there given to the phrase 'obligation or other security of the United States' is to be applied to the Law of 1877, so as to attach to the words 'other securities of the United States' as used in the Law of 1877, the same meaning given to the words 'obligation or other security of the United States' in Section 5413.

"Unquestionably for the purpose for which Section 5413 was inserted within the Revised Statutes stamps would be classified as 'obligations or other securities' wherever those words occur in the immediate context of Section 5413; but in my opinion, the provisions in this section will not apply to and are not a rule of construction for the Act of March 3, 1877. * * *

"It is also of consequence in considering whether Section 5413 is to be extended as a definition to all parts of the Revised Statutes and to all subse-

quent laws passed by Congress, to look at the precise phrase which is defined. The words to which a defined meaning is fixed are 'obligations or other security of the United States.' The phrase is put in quotation marks. This is not the phrase used in the Act of 1877. The words used there are 'other securities of the United States.' It is not identical as a complete phrase. *It is not sound construction to hold that, where by a statute a particular meaning is arbitrarily put upon a certain specified phrase, the same meaning is to be put upon separate parts of the phrase. The statutory meaning* insofar as it is artificial and not the natural and usual meaning *can be applied only to the exact phrase defined and to the whole of it, not to a selected portion."*

(i)

Defined Phrase in Sec. 147 Not Extended to Words Not Precisely the Same—

In 26 Op. Atty. Gen. 231, the question was presented to Attorney General Alfred W. Cooley, whether or not under the law the name of a person whose portrait is placed upon postage stamps is necessary to be inscribed below such portrait. His answer is under date of April 13, 1907. It is said in part.

"By the Act of March 2, 1889 (25 Sts. 939, 945) it was provided 'that hereafter the name of every person whose portrait shall be placed upon any plates for bonds, securities, notes and silver certificates of the United States, shall be inscribed below such portrait." * * *

"However, it has been suggested, that by reason of the definition contained in Section 5413 Revised Statutes, the words securities in the Act of

1889 must be construed as including postage stamps. * * *

"If this construction of Section 5413 is correct it follows that wherever in the statutes of the United States the words 'securities of the United States' occur, those words must have the meaning put upon the words 'obligation or other security' in that section. *I think this is not a correct conclusion.* An examination of the context shows the meaning to be placed upon this expression. * * *"

(j)

We submit, it would make no difference, what the *laws* of Canada *declared* these stamps to be and, *in no event* would it be material what the Canadian *laws declared* these stamps to be.

Does the efficacy of our statue defining a crime rest in the statutory or judicial decisions of a foreign government?

Must the *foreign government,* first hold a particular instrument *to be an obligation or security,* before an offense is committed under the statute? If so, the failure of Canada, for example, to declare its National Bank Notes, "obligations and securities" would be a defense to an indictment under our statute. This is contrary to all reason and authority.

Is it not equally opposed to reason and authority to say that, what Canada has declared (if it has), with reference to these stamps, has any bearing whatever on the issues made by the indictment in the instant case? What it declares these stamps to be or not to be cannot possibly make any difference one way or the other.

A foreign government might declare a picture of its prince or potentate or a calendar or non-negotiable contract or souvenir, or whatever it please, to be an "obligation or security" of such foreign government. Would such declaration thereby broaden the scope of *our* statute?

Again, different governments might declare differently as to the same thing. Thus, to counterfeit the National Bank Notes of Canda might not constitute a crime, while to counterfeit those of France would constitute a crime, depending simply on what the same thing *might be declared to be* by various foreign governments.

We cannot agree that this is either a sound or reasonable interpretation of Section 161.

(k)

A consideration of the Act of which this Section 161 forms a part and of the constitutional authority upon which its enactment rests, conclusively discloses that Congress has not declared acts crimes *depending upon* the condition of law or statutory definitions that may prevail in a foreign country. This statute was declared constitutional in *United States* v. *Arjona*, 120 U. S. 479. The question came up on a certificate of division of opinion between the justices of the Circuit Court of the United States for New York, where defendant was indicted on three counts under the act in question. Part of the questions certified were whether or not Section 161 is constitutional so far as relates to foreign banks and corporations; whether the counterfeiting within the United

States of the notes of a foreign bank or corporation can be constitutionally made by Congress an offense against the law of nations and whether the obligations of the law of nations, as referred to in the Constitution, includes the counterfeiting of the notes of a foreign bank or corporation or of having in possession a plate from which may be printed counterfeits of the notes of foreign banks or corporations, unless it appears in the indictment, that the notes of such foreign bank or corporation are the money of issue of a foreign government.

> "Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, Article I, Section 8, Clause 18; and the Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can 'regulate commerce with foreign nations,' Article I, Section 8, Clause 3; make treaties, and appoint ambassadors and other public ministers and consuls. Art. II, Sec. 2, Clause 2. A state is expressly prohibited from entering into any 'treaty, alliance, or confederation.' Art. I, Sec. 10, Clause 1. Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose given to the United States. The National Government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized 'to define and punish * * * offenses against the law of nations.' Art. I, Sec. 8, Clause 10.
>
> "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to an-

other nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized. Vattel, in his Law of Nations, which was first printed at Neuchatel in 1758, and was translated into English and published in England in 1760, uses this language: 'From the principles thus laid down, it is easy to conclude that if one nation counterfeits the money of another, or if she allows and protects false coiners who presume to do it, she does that nation an injury.' When this was written money was the chief thing of this kind that needed protection, but still it was added: 'There is another custom more modern, and of no less use to commerce than the establishment of coin; namely, exchange, or the traffic of bankers, by means of which a merchant remits immense sums from one end of the world to the other, at very trifling expense, and, if he pleases, without risk. For the same reason that sovereigns are obliged to protect commerce, they are obliged to support this custom, by good laws, in which every merchant, whether citizen or foreigner, may find security. In general, it is equally the interest and duty of every nation to have wise and equitable commercial laws established in the country.' "

* * * * * *

"In the time of Vattel certificates of the public debt of a Nation, government bonds and other government securities, were rarely seen in any other country than that in which they were put out. Banks of issue were not so common as to need special protection for themselves or the public against forgers and counterfeiters elsewhere than at home; and the great corporations, now so numerous and so important, established by public authority for the promotion of public enterprises, were

almost unknown, and certainly they had not got to be extensive borrowers of money wherever it could be had, at home or abroad, on the faith of their quasi public securities. Now, however, the amount of national and corporate debt and of corporate property represented by bonds, certificates, notes, bills and other forms of commercial securities, which are bought and sold in all the money markets of the world, both in and out of the country under whose authority they were created, is something erroneous.

* * * * * * *

"Again, our own people may be dealers at home in the public or quasi public securities of a foreign government or of foreign banks or corporations, brought here in the course of our commerce with foreign Nations, or sent here from abroad for sale in the money markets of this country. As such they enter into and form part of the foreign commerce of the country. If such securities can be counterfeited here with impunity, our own people may be made to suffer by a wrong done which affects a business that has been expressly placed by the Constitution under the protection of the Government of the United States."

(1)

From the foregoing decision, it clearly appears that the reason and purpose of the Act is to protect against the counterfeiting of those representatives of value of foreign governments which are and do, in fact, circulate in our country as money. The authority of Congress to so legislate rests on its exclusive power to regulate foreign commerce and to define and punish violations of the law of Nations. The benefit thus derived is two-fold

i. e., protection of our own citizens against counterfeit foreign money and protection of the foreign Government and its people against counterfeits of its own money made within our jurisdiction. The whole idea is the preservation of the integrity of a medium of exchange.

Now, it must be very apparent, that the statute has not for its object the protection of those things which may, either arbitrarily or generically, by statutory or judicial definition of the foreign Government, be declared to constitute obligations and securities of such Government. Congress has not evidenced any legislative intent to protect against counterfeiting anything that a foreign Government may declare constitutes its obligations and securities. Neither has it evidenced an intent not to protect those instruments which, by reason of their own peculiar intrinsic nature and qualifications, constitute obligations or securities of a foreign Government or bank, but which may, nevertheless, not have been declared to be such by statutory or judicial authority of such foreign Government.

When Congress therefore declared that no person should counterfeit any "*genuine* note, bond, obligation or other security, or any part thereof, of any foreign Government, bank or corporation," it clearly meant to bring within the inhibition of the statute those things which under *our* law, would constitute notes, bonds, obligations or other securities. It would be a matter entirely without precedent, so far as we are advised, for Congress to use language, which has a definite and judicial meaning by the law of our Government and country, if it, in fact,

intended that language to have a meaning co-extensive with the statutory and judicial definition of not one foreign Government, but every foreign Government. It would be still more unreasonable to suppose, that Congress had such intent and never, at any time or place, by apt or appropriate language declared that the interpretation of the statute should depend upon the law of the foreign forum.

If the scope of our statute is determined by the foreign law, then the statute itself does not set out all the elements of the crime, but the individual must know at his peril, the rule of law existing in the various foreign governments. The law presumes that every man knows the law of this country and, therefore, holds him to strict accountability for violations thereof. But, we do not know of any rule, which assumes that men know the laws of foreign governments any more than courts know the laws of foreign governments without proof thereof. In order therefore to avoid committing a crime, the person must be assumed to know the law of this country and also the law of the foreign government, which this court and other courts many times have frequently held is entirely a question of fact.

This imports into the statute such an indefiniteness and uncertainty that the statute could not be sustained as constitutional. There is a collection of authorities in the case of *U. S.* v. *Armstrong*, 265 Fed. 683, on this question.

(m)

In re Green, 52 Fed. 104, it is said:

"But the act does not undertake to define what constitutes a contract, combination or conspiracy in restraint of trade and recourse must therefore be had to the common law for the proper definition of these general terms and to ascertain whether the acts charged come within the statute. We regard it as settled by the authorities that an indictment following simply the language of the act, would be wholly insufficient for the reason that the words of the statute do not, of themselves, fully, directly and correctly set forth all the elements necessary to constitute the offense intended to be punished. (Citing authorities.)

"Under the principle established by those cases, the several counts of the present indictment must be tested, not by the general recitals and averments thereof, although, in the words of the statutes, but, by the specific acts or particular facts which are alleged to have been actually done and committed by the accused. *If the particular acts or facts charged do not, as a matter of law, constitute contracts,* combinations or conspiracies in restraint of trade and commerce among the several states, or a monopoly or attempt to monopolize any part of such trade, or commerce, *no amount of averments and allegations that the accused engaged in a combination or made contracts* in restraint of such trade or commerce or monopolized or attempted to monopolize the same, *will avail to sustain an indictment.* Whether the accused is charged with an offense should be determined by the *particular acts or facts* set forth and not by the conclusions of the pleader, although asserted in the words of the statute: 'every offense consists of certain acts done or omitted under certain circumstances and, in the indictment for the offense, it is not sufficient to charge

> the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth.' *U. S.* v. *Cruikshank*, 92 U. S. 542."

We think the foregoing opinion is particularly applicable to this case. The statute in the instant case denounces the counterfeiting of certain things. Those things are enumerated and named *according to common law classification.* In determining, therefore, in the particular case, whether or not an offense has been committed, regard must be had to whether or not the particular facts charged to be an offense do, in fact, under the interpretation given to the statute, under the common law, constitute such offense. It is not sufficient to allege in an indictment under Section 161, that defendant did counterfeit a certain obligation and security of the Dominion of Canada to-wit: an internal revenue stamp; such an indictment would be wholly insufficient. How then, can it be said that, when the indictment does set up the particular acts and facts which are alleged to constitute the offense and then generally, in the terms of the statute, charges the instrument therein described to be an obligation or security of the Dominion of Canada and the particular facts show that it is not an obligation or security of the Dominion of Canada, that the general allegation helps the indictment?

It is an offense under the statute to counterfeit the notes of a foreign Government, but whether the instruments described as such notes are, in truth notes, is a question of law. Likewise, it is an offense to counter-

feit the bonds of a foreign government and whether the instruments are bonds, constitutes a question of law. Whether the stamp in question is an obligation or security of the Dominion of Canada is a question of law to be determined, not according to the law of Canada, but according to the law of the United States. If it is an obligation or security as those terms are defined and understood by the common law then such fact will appear from the face of the instrument.

(n)

A consideration of the questions of fact necessary to be proved in order to show a violation of Section 161 shows that the declarations of the foreign government do not form any part of the offense. The section makes it an offense to counterfeit any *"genuine* note, bond, obligation or other security."

There are only two questions of fact to be shown. The first is that the foreign government, bank or corporation does issue a *genuine* instrument of the kind described in the indictment. This does not involve showing that that genuine instrument has been declared to be an obligation or security, or a note or bond, but simply that a genuine instrument, of the kind described, does exist.

The second question of fact to be proved is that the defendant counterfeited the genuine instrument by making the false one described in the indictment.

These are the only questions of fact arising on indictment under this section. The remaining question is one of law for the court and that is whether or not the instrument described is a note, bond, obligation or other security.

We respectfully submit that the indictment does not charge any offense under the laws of the United States.

L. S. HARVEY,
Kansas City, Kansas.
I. J. RINGOLSKY,
M. L. FRIEDMAN,
W. G. BOATRIGHT,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
Kansas City, Missouri.
Counsel for Appellee.

OCT 27 1924
WM. R. STANSBU

No. 96.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

W. I. BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS, APPELLANT,

VS.

ISADORE LUVISCH, APPELLEE.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF APPELLEE.

L. S. HARVEY,
Kansas City, Kansas,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
I. J. RINGOLSKY,
M. L. FRIEDMAN,
WM. G. BOATRIGHT,
All of Kansas City, Missouri,
Counsel for Appellee.

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CITATIONS.

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REPLY BRIEF OF APPELLEE.

The questions treated of in this reply brief filed pursuant to leave of court are:

(1) In *habeas corpus* can the fact that no offense known to the law—that is a colorless or impossible offense under the law—be considered?

(2) Does such an indictment invest the trial court with jurisdiction to sentence petitioner?

(3) Is a judgment of five years imprisonment rendered on such an indictment charging a colorless and

an impossible offense under the law void or merely erroneous?

These questions have never been *decided* by this court so far as we know.

(a)

Lack of jurisdiction is not confined to any one cause. Lack of jurisdiction may arise from any one of a variety of entirely different causes. It may result from the illegal organization of a court; exercise of jurisdiction in excess of that granted by law; from lack of an indictment where one is required; or, as in this case, where the act charged in the indictment is an absolutely innocent act that is a colorless and impossible offense under the law, which is the same as though no indictment whatever existed. The law-making body has not invested the court with power to punish innocent acts or colorless and impossible offenses but only to punish what is a crime and, no matter how formal the indictment or particular the trial, yet, if the act charged be innocent and constitute no crime whatever, or is a colorless and impossible offense all the formality is for naught, the prisoner is confined without lawful authority, the judgment is void and the court has acted entirely without jurisdiction. It has no power—no jurisdiction—to punish one for an innocent act or for a colorless and impossible offense.

An attempt has been made to confound this case with those cases where acts made an offense by law have been imperfectly or insufficiently charged. In all such cases where habeas corpus has been asked, the courts

have properly applied the rule that, if the trial court had jurisdiction of the class of offenses charged, that it was a question for such court to determine whether or not the act charged was sufficiently and legally charged.

But in such a case as this, it is no answer to say that the judgment cannot be attacked because rendered in a case of a class over which the court has jurisdiction. It must be apparent that, where the act charged constitutes *no offense*, then the indictment does not charge one of a *"class of offenses,"* of which the court has jurisdiction —*"no offense,"* cannot be one of a *"class of offenses."* The case cannot be one of a *"class of offenses"* because the court has no power to punish in a class of cases, where the acts done are innocent. Because some prosecutor or pleader conceives that what is, in reality, an innocent act under the law, or a colorless and impossible offense, is a crime and a violation of some particular statute, does not make the act fall within the *"class of cases"* condemned by the particular statute. It still remains an innocent act and does not fall within any *"class of crimes."* It is impossible for it to be otherwise. The *"class of cases"* over which the court has jurisdiction can never be broader than those acts which do, as a matter of fact, constitute a violation of the law. Any other act falls without the class.

The result in such case is that the court *has no jurisdiction of the subject-matter.* Such lack of jurisdiction is relieved against in habeas corpus. Simply to denominate innocent acts or colorless and impossible offenses, crimes does not make them so.

(b)

We quote a few of the decisions of state courts and statements of text writers precisely in point to show the court our contentions are supported by authority and reason.

In re Joseph Siegel, 263 Missouri, 375, it is said:

> "Petitioner asserts that there is no law which denounces as a crime his act in voting more than once in the before-mentioned municipal election and that, therefore, he is entitled to his discharge. We will consider this insistence first, for if it be true that the acts, of which petitioner was convicted, are not denounced as a crime by any law in force in this state, *then his confinement is unlawful notwithstanding his plea of guilty* to the information preferred against him."

In *Ex parte Maier,* 103 Cal. 476, it is said:

> "Petitioner asked for his discharge on habeas corpus upon the ground that the compalint does not state a public offense, and if that be true, there is no question but that he is entitled to his discharge in this proceeding."

Judge Church in his work on Habeas Corpus, Second Edition, Sec. 245, states the law as follows:

> "Inquiry may go to whether the indictment charges any offense. While inquiry cannot extend beyond an indictment into fields of unknown facts, the indictment itself may be examined upon habeas corpus, although it appears that the defendant has been detained to answer it under a commitment in due form. The court, or judge of the court where-

in such indictment is pending, may proceed to inquire whether it charges any offense known to the law, for *this goes to the jurisdiction,* which is always a proper subject of inquiry in a proceeding of this character. *If such were not the case, the simple warrant of a court, however arbitrary it might be, would constitute a complete answer to the writ.* An indictment must contain the statement of an offense known to the law, and, under the rules well settled by judicial decision this may be inquired into, if the court or judge determines, that it does not, the prisoner must be discharged as a matter of right."

In a note to the above section it is stated:

"A court can punish for no act except what is made criminal by law; it has no power to punish for something unknown to the law. It has jurisdiction to try and punish only for certain offenses, and those must be made criminal by law. If an indictment shows no offense, there is no criminality shown, and *there is nothing of which a court can take jurisdiction.* And if a court have no jurisdiction its action is void—a condition which it is the very object of habeas corpus to cure. Voidable informalities or irregularities are not reached by it, but fatal jurisdictional defects are ever within its range, either before or after indictment, and even after conviction and judgment."

In 12 R. C. L. pages 1190 and 1203, the following statements are made:

"The statement of some offense known to the law is *essential to the jurisdiction of the court* and is, therefore, a fact which may be inquired into on habeas corpus, and if it appears from the face of the indictment, information or complaint that it fails to state a crime, detention thereunder may be

relieved against, *as being without, jurisdiction.*

* * * * * *

"Thus, it has been held that when the facts charged or attempted to be charged, do not constitute any public offense, the defendant will be discharged, as *this goes to the jurisdiction of the court.*"

In *Ex Parte Rickey,* 100 Pac. 134 (Supreme Court of Nevada), it is said:

"Suffice it to say that where as in the petition in this case it is claimed upon the part of petitioner that the indictment does not allege an offense known to the law and it is admitted by the state that the true facts are stated in the indictment, it becomes the duty of the court to consider the question thus presented. *And if the facts so alleged and admitted as complete do not constitute an offense known to the law, then the defendant is entitled to his discharge. The court derives jurisdiction from the law and its jurisdiction extends to such matters as the law declares criminal and no other and when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction* (citing numerous decisions including Federal cases)."

In *Ex parte Ballard,* 223 S. W. 222 (Texas), after conviction, petitioner sought a writ of habeas corpus on the ground that the indictment charged an innocent act. The court says in part:

"Relator contends that the facts pleaded against him in the information, if true, did not constitute a violation of any law of this state, and that, under such state of case, the judgment would be a nullity. In Bishop's New Practice, Vol. 2, para-

graph 1410, it is said: 'Where the allegation against an indicted or convicted prisoner discloses no crime, it seems to follow that he may be set at liberty on this writ.' * * *

"We do not deem the above to be in any wise in conflict with the statement of some of the courts that habeas corpus will not lie to test the sufficiency of a complaint or indictment. An examination of those decisions so holding will, we think, invariably disclose a refusal by the courts of an application for a writ, when it is sought for the purpose of securing a ruling of the higher court in advance of a hearing in the trial court; or where the errors complained of are mere irregularities or defects in form. * * * *When the contents of the indictment, if admittedly true, charge no offense, the trial court is without jurisdiction to render a judgment and such judgment, if entered, would be a nullity. It is as though, upon no pleading, the court assumed power to render a judgment. We know of no authority holding the contrary to what we have just stated.*

"It is said in 21 Cyc. page 296 that want of jurisdiction over person or subject-matter is always a ground for relief by habeas corpus for, if the court has acted without jurisdiction, its judgments or orders are absolutely void, even on collateral attack. Jurisdiction of the person of the accused *or of the class of offenses sought to be charged is not sufficient but there must be such jurisdiction as gives to the court the power and right to hear and determine the particular matter and to render the particular judgment.*"

(c)

In re Coy, 127 U. S. 731. Petitioner was tried, found guilty and sentenced. The court says:

> "The petitioners also present a copy of the indictment attached to their petition which they say charges no offense against the United States and that the Federal District Court and the Grand Jury thereof had no jurisdiction in the premises * * *. The proposition is founded not upon any want of jurisdiction of the person but upon the broad statement that the indictment presents no crime or offense under the laws of the United States. The indictment itself is of considerable length, although consisting of but one count. It reads as follows:"

The court, after setting out the indictment, proceeds to take up the various objections of petitioner to same and, by an examination of the case, it will be seen that the objections there made by petitioner to the indictment were not such as showed that the indictment charged him with an innocent act but were objections going to the indictment in its sufficiency as a legal pleading and involving questions only properly to be considered on motion to quash or demurrer and not involving a colorless or impossible offense. The court in that situation applied the rule laid down in *Ex parte Watkins*, 3 Pet. 193 and *Ex parte Parks*, 93 U. S. 18, and other cases that, in habeas corpus, where the indictment is attacked, the inquiry in such case is not whether there is in the indictment such specific allegation of the details of the charge as would make it good on demurrer, but whether the indictment describes a class of offenses of which the court has jurisdiction. This court there con-

sidered and found the indictment did charge a crime. After quoting the language of Chief Justice Marshall in *Ex parte Watkins, supra,* the court makes this statement, which is very significant:

> "It may be said that this language is too broad in asserting that, because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which belongs to it and cannot, therefore, be questioned in any other court. *But we do not so understand the meaning of the court.* It certainly was not intended to say that, because a Federal Court tries a prisoner for an ordinary common-law offense, as burglary, assault and battery or larceny, with no averment or proof of any offense against the United States or any connection with a statute of the United States and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had *assumed* jurisdiction."

The foregoing case was cited and quoted from twice by Judge Pollock as sustaining our contentions in deciding this matter.

(d)

Greene v. *Henkel,* 183 U. S. 249, was an application for a writ of habeas corpus in a removal case. This court there, speaking by Mr. Justice Peckham, said:

> *"We do not, however, hold, that when an indictment charges no offense against the laws of the United States,* and the evidence given fails to show any, or if it appear that the offense charged was not committed or triable in the district to which the removal is sought, the court would be justified in ordering the removal, and thus

> subjecting the defendant to the necessity of making such a defense in the court where the indictment was found. *In that case there would be no jurisdiction* to commit nor any to order the removal of the prisoner."

In *Henry* v. *Henkel,* 235 U. S. 219, also a removal case, this court, after setting out the rule that, where the offense is one of a class of offenses of which the court has general jurisdiction, that no inquiry will be made as to the jurisdiction of the court on habeas corpus, says:

> *"The cases cited do not, of course, lead to the conclusion that a citizen can be held in custody or removed for trial where there was no provision of the common law or statute making an offense of the acts charged. In such cases* the committing court would have *no jurisdiction,* the prisoner would be in custody without warrant of law and therefore *entitled to his discharge."*

In *Pierce* v. *Creecy,* 210 U. S. 387, an extradition case where habeas corpus was sought, this court says:

> "Here the only condition which is insisted is absent, is the charge of a crime. The only evidence of a charge of crime is the indictment, and the contention to be examined is that the indictment is insufficient proof that a charge has been made.
>
> "The counsel for the petitioner disclaimed the purpose of attacking the indictment as a criminal pleading, appreciating clearly that the point is not whether the indictment is good on sufficiency, or over seasonable challege, to bring the accused to the bar for trial. *Counsel concede that they cannot successfully attack the indictment except by showing that it does not charge a crime. The distinction between these two kinds of attack though narrow is clear."*

We fail to see why the reasoning and language of this court in the three cases last quoted from is not thoroughly applicable to the question here involved. The considerations there made were not made under any special law not now involved and, moreover, their applicability is in accordance with reason and all clearly hold that where the indictment charges a colorless and impossible offense no jurisdiction exists.

(e)

In *Goto* v. *Lane*, 44 Supreme Court Reporter, 525, decided June, 1924, which is the latest case touching the subject in any way, application for habeas corpus after conviction was sought, one of the grounds being that the use of the disjunctive "or" rendered the indictment so uncertain that it did not meet the requirements of the constitution. This court says that the construction to be put on the indictment, its sufficiency and the effect to be given to the stipulation were all matters, the determination of which rested primarily with the trial court and, if it erred in determining them, its judgment was not for that reason void. But this court makes this further important statement, clearly recognizing that an indictment may not charge any offense so as to give jurisdiction, saying:

> "The offense charged was neither colorless nor an impossible one under the law."

(f)

Ex parte Lange, 18 Wall. (U. S.) 163, petitioner after conviction sought habeas corpus. The sentence

was that petitioner should pay a $200.00 fine which was paid.

The court then set aside the sentence of a fine and rendered one of imprisonment, petitioner contending the court could only impose a fine *or* imprisonment for the offense, and could not do both asked for the writ. This court granted the writ, saying:

> "A judgment may be erroneous and not void and it may be erroneous because it is void. * * * We are of the opinion that, when the prisoner, as in this case, by reason of a valid judgment, had suffered one of the alternative punishments, *to which alone the law subjected him, the power of the court to punish further was gone.* * * * The records of the court's proceedings at the moment the second sentence was rendered, showed that, in that very case and for that very offense the prisoner had fully performed, completed and endured one of the alternative punishments which the law prescribed for that offense and had suffered five days' imprisonment on account of the other. *It thus showed the court that its power to punish for that offense was at an end.* Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common-law by the protection of personal rights in that regard are a nullity, the authority of the court to punish the prisoner was gone. The *power* was exhausted; its further exercise was prohibited. It was error, but it was error because the *power to render any further judgment did not exist.*
>
> It is *no answer* to this to say that the court had *jurisdiction of the person* of the prisoner *and of the offense* under the statute. It, *by no means, follows that these two facts make valid,* however erroneous it may be, *any judgment* the court may render in such case. If a justice of the peace, hav-

> ing jurisdiction to find for a misdemeanor and with the party charged properly before him, should render a judgment that he be hung, it would simply be *void*. Why void? Because he had *no power to render such a judgment*. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, it would, for the same reason, be void."

In the instant case the court did not exhaust its power to punish but it had no power in the first instance to punish because no crime had been committed. What is the difference in principle? Whether the lack of jurisdiction is because it has been exhausted or because none ever existed is equally the same—no jurisdiction existed to render the particular judgment and the same may be relieved against in habeas corpus.

In *Ex parte Baine*, 121 U. S. 1, petitioner was tried and convicted on an indictment found by a Grand Jury, which indictment, before trial began, had several words added to it by the court. Petitioner applied for the writ contending he could only be tried on indictment of a Grand Jury and that an indictment thus amended was not such an indictment as the law contemplated and any act of the court punishing him pursuant thereto was without jurisdiction and void. This court sustained his contention saying:

> "It only remains to consider whether this change in this indictment *deprives the court of the power of proceeding* to try the prisoner and sentence the prisoner as provided in the statute. We have no difficulty in holding that the indictment on which he was tried was *no indictment of a grand jury*. The decisions which we have already re-

ferred to, as well as sound principle, require us to hold that if the indictment was changed it was no longer the indictment of the grand jury who repsented it. *Any other doctrine would place the rights of the citizen* which were intended to be protected by the constitutional provision at the *mercy or control of the court* or prosecuting attorney; for if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court in regard to the prerequisite of an indictment in reality no longer exists. *It is of no avail under such circumstances to say that the court still has jurisdiction of the person and of the crime;* for though it has possession of the person and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone and the court has no right to proceed any further in the progress of the case for want of an indictment. *If there is nothing before the court which the person in the language of the constitution can be held to answer, he is then entitled to be discharged* so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or *nolle prosequi* had been entered. *There was nothing before the court on which it court hear evidence or pronounce sentence."*

An indictment which charges no offense known to the law surely does not furnish any better basis for the judgment of the court than an indictment which charges an offense known to the law and which is criminal, but which indictment, since returned, has been amended in

some respect. This court, in the foregoing case, well pointed out that it was of no avail to say that the court had jurisdiction of the person and of the crime, but that the jurisdiction of the particular offense was gone for want of an indictment. Now the indictment here is the same as no indictment because what it sets out to be a crime is, under our law, no crime. There was nothing before the District Court that accepted the plea of guilty of the petitioner and sentenced him, upon which it could lawfully impose any sentence and, by all the reasoning of this court in the foregoing case, its judgment sentencing him was without power and jurisdiction.

In Hans Nielson, petitioner, 131 U. S. 176, petitioner had been indicted, found guilty and sentenced on what he contended was a second trial and judgment for the same offense, for which he had previously been found guilty and punished. This court, speaking by Mr. Justice Bradley, says:

> "The objection to the remedy of habeas corpus, of course, would be that there was in force a regular judgment of conviction which could not be questioned collaterally as it would have to be on habeas corpus. But there are *exceptions to this rule* which have more than once been acted upon by this court. It has been *firmly established* that if the court which renders a judgment *has not jurisdiction* to render it, either because the proceedings or the law under which they are taken, are unconstitutional *or for any other reason, the judgment is void* and may be questioned collaterally and a defendant who is imprisoned under and by virtue

of it may be discharged from custody on habeas corpus.

* * * * * * *

"It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than *an unconstitutional conviction and punishment under a valid law.* In the first case it is true the court has no authority to take cognizance of the case; but *in the other it has no authority to render judgment against the defendant.* * * * A party is entitled to a habeas corpus not merely where the court is without jurisdiction of the cause but *where it has no constitutional authority or power to condemn the prisoner.* As said by Chief Baron Gilbert in a passage quoted in *Ex parte Parks,* 93 U. S. 18, 'If the commitment be against law as being made by one who had no jurisdiction of the cause or *for a matter for which by law no man ought to be punished, the courts are to discharge.*' This was said in reference to cases which had gone to conviction and sentence. Lord Hale laid down the same doctrine in almost the same words. 2 Hale's Pleas of the Crown 144. And why should not such a rule prevail in *favorem libertis? If we have seemed to hold the contrary in any case it has been from inadvertence.*"

The last sentence in the above quotation is of peculiar significance, following as it does the reference to *Ex parte Parks,* 93 U. S. 18, relied upon by the Government in this case.

If it was outside of the power and jurisdiction of the court to punish Hans Nielson a second time for the same offense, is it not also outside the power and jurisdiction of the court to punish Isadore Luvisch for no offense whatever? It is difficult to see why punishment

contrary to an express constitutional provision is more violative of a person's constitutional rights, than punishment contrary to the inherent provisions of the Constitution and all our law, viz., that one shall not be punished for that which is not a crime.

(g)

We come now to consider the two cases cited and relied on by the government, *Matter of Gregory*, 219 U. S. 210 and *Glasgow* v. *Moyer*, 225 U. S. 420. The Gregory case supports the petitioner's contentions in every respect. The petitioner there had been charged in the police court of the District of Columbia, with violating a certain statute of the District of Columbia, relating to trading stamps. After a judgment of guilty and sentence, application was made for a writ of habeas corpus. The ground upon which the petitioner challenged the legality of his punishment was *that the statute was unconstitutional*. This court says by Mr. Justice Hughes:

> "The only question before us is whether the police court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment. * * *
>
> "We come then to the grounds upon which the jurisdiction of the police court is assailed. It is urged that the prohibition contained in the statute

> under which the information was brought is unconstitutional, in that it violates the Fifth Amendment of the Constitution of the United States by depriving the petitioner of liberty and property without due process of law." * * *

After consideration of the question of the constitutionality of the statute, this court says:

> "We have then a statute with valid operation. This being established there can be no question that it conferred upon the police court, by its express terms, jurisdiction of the offense, and that court tried and convicted the petitioner.
>
> "But it is insisted that the facts do not support the conviction. The argument ignores the nature of this proceeding, *unless it be meant that no colorable question was presented; that on the agreed statement of facts and viewing the statute as prohibiting transactions involving the element of chance, there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated.*
>
> "Such a contention is without merit. *It is by no means manifest that the scheme* or enterprise in which the petitioner was engaged *lay outside the range of judicial consideration under the statute.* On the contrary, the agreed statement of facts presented questions requiring the exercise of judicial judgment, and the case falls within the well established rule."

What did this court mean when it said that the contention of the petitioner, Gregory, that the facts did not support the conviction was untenable "unless it be meant that no colorable question was presented," and, when it

said unless "there was such an obvious and palpable want of criminality that the judicial judgment cannot be said to have been invoked, and that therefore the court had no jurisdiction to determine whether or not the statute had been violated," if it did not mean and concede that there could be an indictment or an agreed state of facts so wholly free from criminality as not to give the court jurisdiction to impose any sentence? That this is the clear and undeniable meaning of the court is conclusive from its further statement that "It is by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside the range of judicial considerations under the statute." This supports contention of petitioner in this case that, where an indictment charges merely an innocent act a colorless and impossible crime, that the jurisdiction of the trial court is not invoked and its sentence is void and may be attacked in *habeas corpus*. The Gregory case, instead of being an authority for the position of the government, is an authority directly and squarely supporting the contention of the petitioner.

From the statement of the court in the Glasgow case it appears petitioner there had sought the writ before trial on the same grounds. It is apparent the decision turns not on the question of the right to consider the matters there raised in *habeas corpus* but because the court had on the previous application instructed and directed petitioner how to proceed to avail himself of the questions raised and he had disregarded these directions and the court therefore on his second application for the

writ said that "having remitted him to a writ of error as a remedy it would be a contradiction of the ruling, he not having availed himself of the remedy, to permit him to prosecute *habeas corpus.*"

This case of *Glascow* v. *Moyer,* as we understand it, does not hold that the court can not discharge in habeas corpus proceedings one who pleaded guilty to an indictment charging a colorless and an impossible offense. That point was not raised in the case, for on pages 427 and 428, the court sets out the assignments of error and the other questions raised in the petition filed in the court below, and a reading of the assignments of error and of the points presented, do not include the question now before the court in the instant case.

It is true this court held that in a habeas corpus proceeding, after conviction, the court will not consider the question of whether or not the act creating the crime is constitutional. But that is not the question in the instant case. If this court had declared an act creating a crime unconstitutional, and afterwards a court not knowing of the action of this court, had permitted an indictment to be returned charging one with the crime under the law which had already been declared unconstitutional, and the party so charged had pleaded guilty and had been sentenced, then we, in our opinion, would have a question similar to the one in the instant case: for there can be no difference between pleading guilty to an indictment that charges a colorless and an impossible offense, and pleading guilty to an indictment charging a crime under an act which had already been declared

unconstitutional. The Glascow case is utterly without application in this case.

In this case petitioner attacks the jurisdiction of the District Court over the purported cause of action, on the ground that the same is not a crime and is a colorless and impossible offense under the law. If such an objection does not go directly to the jurisdiction and power of the court to sentence and punish, then it is indeed hard to conceive what objections do reach the jurisdiction of the court.

The whole question resolves itself into whether or not the court is going to put procedure above the fundamental rights of the citizen. Just because Luvisch plead guilty to something that was not a crime, a colorless and impossible offense under the law and by all the law should not spend the next four years in the penitentiary, is there not a remedy open to him? If he had plead guilty to counterfeiting the Declaration of Independence no one would contend he had been guilty of any crime, yet having pleaded guilty, is this court going to leave him spend the other four years of his five year sentence in the penitentiary just because he might have sued out a writ of error.

Respectfully submitted,

L. S. HARVEY,
Kansas City, Kansas,
RINGOLSKY, FRIEDMAN & BOATRIGHT,
I. J. RINGOLSKY,
M. L. FRIEDMAN,
WM. G. BOATRIGHT,
All of Kansas City, Missouri,
Counsel for Appellee.

In conformity with the suggestion of Mr. Chief Justice Taft made from the bench during oral argument, we are attaching to this brief an appendix showing the memorandum decisions of Judge John C. Pollock on the motion to dismiss herein and on the application for writ of *habeas corpus*. The decision of the Court of Appeals, Eighth Circuit and the dissenting opinion of Judge Lewis, will be found in 287 Federal, 699.

APPENDIX.

In the District Court of the United States for the District of Kansas, First Division. In re Petition Isadore Luwisch, for Writ of Habeas Corpus. No. 2339.

Memoranda of Decision on Motion to Dismiss.

Petitioner, with others, was indicted on three counts in the Eastern District of Michigan, charged with violations of Section 161 of the Penal Code, which reads:

> "Whoever, within the United States or any place subject to the jurisdiction thereof, except by lawful authority, shall have control, custody, or possession of any plate, stone or other thing, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank or corporation, or shall use such plate, stone or other thing, or knowingly permit or suffer the same to be used in counterfeiting such foreign obligations, or any part thereof; or whoever shall make or engrave, or cause or procure to be made or engraved, or assist in making or engraving, any plate, stone or other thing, in the likeness or similitude of any plate, stone or other thing designated for the printing of the genuine issues of the obligations of any foreign government, bank, or corporation, or whoever shall print, photograph, or in any other manner make, execute, or sell, or cause to be printed, photographed, made, executed or sold, or shall aid in printing, photographing, making, executing, or selling, any engraving, photograph, print, or impression in the likeness of any

> genuine note, bond, obligation, or other security, or any part thereof, of any foreign government, bank, or corporation; or whoever shall bring into the United States or any place subject to the jurisdiction thereof, any counterfeit plate, stone, or other thing, or engraving, photograph, print, or other impressions of the notes, bonds, obligations, or other securities of any foreign government, bank or corporation, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

On a plea of guilty he was sentenced to serve a term of five years imprisonment in the Federal Penitentiary at Leavenworth and pay a fine of five thousand dollars. Being confined under this judgment he brings this application for release on writ of *habeas corpus*.

The warden in charge of the prison, as respondent, moves to dismiss the petition for the reason on its face it presents no ground justifying the granting of the writ prayed for discharging petitioner.

The question sought to be raised and discussed on the motion to dismiss is this:

The indictment to which petitioner entered his plea of guilty, and on which judgment was pronounced against him, charges no offense under any law of the United States giving the court any jurisdiction or power to pronounce the judgment against him which was pronounced.

While the indictment is intended to charge petitioner with three several offenses under said Section 161 of

the Penal Code above quoted, whether in point of law any offense was in fact committed by him as charged in the indictment must be determined by taking the law, in one hand, and the acts charged to have been done by him to which he has confessed, in the other, and if when so considered no violation of the law appears, then the court had no offense to try or determine, the plea of guilty entered thereon admits no wrong done in violation of the law, and the judgment of conviction has no foundation on which to stand. To this extent go all the controlling authorities on this subject.

In re Coy, 127 U. S. 731, it is said:

> "The writ of *habeas corpus,* in case of a person held a prisoner by sentence of court, can only release the prisoner when it is shown that the court had no jurisdiction to try and punish him for the offense. The inquiry in such case is not whether there is in the indictment such specific allegation of the details of the charge as would make it good on demurrer, but whether the indictment describes a class of offenses of which the court has jurisdiction, and alleges the defendant to be guilty. If the record of the case in which judgment of imprisonment is pronounced contains no charge of such offense, he should be discharged."

In *Ex parte Parks,* 93 U. S. 23, it is said:

> "The court will look into the proceedings so far as to determine this question. If it finds that the court below has transcended its powers, it will grant the writ and discharge the prisoner, even after judgment."

In *Roberts* v. *Riley,* 116 U. S. 80, Mr. Justice Matthews delivering the opinion for the court, says:

> "The court must find that the petitioner is substantially charged with a crime against the laws of the United States. This is a question of law and is always open upon the face of the papers to judicial inquiry on an application for discharge on a writ of *habeas corpus.*"

In 12 R. C. L., p. 1203, it is said:

> "Thus it has been held that when the facts charged or attempted to be charged, do not constitute any public offense the defendant will be discharged as this goes to the jurisdiction of the court."

The question presented on this application therefore is this: Is the paper or "inland excise stamp" described in the several counts of the indictment, if genuine, as a matter of law such an obligation or security of the Dominion of Canada as is contemplated by the law-making power of the enactment of Section 161 of the Penal Code? If so, petitioner violated the law, by his plea of guilty confessed such violation, and is justly undergoing punishment. On the other hand, if the paper described in the indictment as an "inland excise stamp" does not, if genuine, in any just sense, fall within the general classification made by the law-making power in the enactment of said Section 161, it then follows the act of defendant admitted by him to have been done by his plea of guilty entered, confesses no violation of the law for which there was any jurisdiction or power in the court to punish him, and he must be released.

Now, while the law-making power has in Section 147 of the Code defined what constitutes an "obligation or other security of the United States" the Congress has not attempted the making of any definition or classification of the obligations or securities of a foreign government for reasons perfectly obvious, leaving any such definition to be either gathered from the commonly accepted meaning of the terms employed or to be arbitrarily defined as the law-making power of such foreign government might desire to provide in its laws. This being true, I am inclined to the opinion at this time the paper described in the indictment as an "inland excise stamp" constitutes in no just sense either an obligation or other security of the Dominion of Canada within the generally accepted meaning of these terms. However, this case comes before the court on a mere motion to dismiss the petition, on the hearing of which all matters in the petition well pleaded are confessed by respondent. It may be true, as a fact, the law-making power of the Dominion of Canada has described or classified her obligations and securities or by law prescribed their nature. If so, manifestly, it was the intent of the law-making power of our government in affording protection against the counterfeiting of the securities and obligations of foreign government to adopt the meaning placed on those terms by the foreign government sought to be defrauded by the acts done within this country. If so, such definitions, if any, as are by the law of such foreign country made should be here construed as the local law of such country is construed. Now, as the law of such foreign

country, if any, is not pleaded in the indictment in this case, and as in my judgment the "inland excise stamp" described therein is neither a security nor obligation in the common and generally accepted meaning of those terms, and as the judgment of conviction is shown by the record to rest upon the charges in the indictment and the admission of their doing by defendant, and as the indictment charges the same to be securities or obligations of the Dominion of Canada, the motion to dismiss must be denied and the respondent directed, if so advised by his counsel, to answer the petition within twenty days from this date in order that the facts as to the existence of any such foreign laws, if any may be investigated.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas,
February 25, 1922.

Endorsed: No. 2339 In Re Isadore Luvisch, Habeas Corpus. Memo. of Decision denying Motion to Dismiss and directing Respondent to answer in 20 days. Filed Feb. 25, 1922 F. L. Campbell, Clerk.

In the District Court of the United States for the District of Kansas, First Division. In the Matter of the Petition of Isadore Luvisch, for Writ of Habeas Corpus.

Order Denying Motion to Dismiss.

Now on this 25th day of February, 1922, the above matter comes on for consideration on respondent's motion to dismiss the petition filed herein, and, the court

having examined the pleadings, briefs of counsel, and being well advised in the premises, finds said motion to dismiss should be, and the same is hereby denied, for reasons set forth in the memoranda of decision this day filed.

It is further ordered, respondent, if so advised by counsel, file his answer to the petition herein, within twenty days from this date. To which order and ruling of the court respondent excepts.

United States of America, District of Kansas, ss.

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full, and correct copy of memo of decision on motion to dismiss and order denying motion to dismiss in Case No. 2339, entitled In the Matter of the Petition of Isadore Luvisch, for Writ of Habeas Corpus, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 27th day of February, 1922.

F. L. Campbell, Clerk,
(Seal) By C. B. White, Deputy Clerk.

In the District Court of the United States for the District of Kansas, First Division. In re Isadore Luvisch, Application for Writ of Habeas Corpus. No. 2339.

Memoranda of Decision on Application for Writ of Habeas Corpus.

Petitioner was indicted in the Eastern District of Michigan on three counts charged with violation of Section 161 of the Penal Code, plead guilty to the charges and was by the court sentenced to serve five years imprisonment in the Federal Prison at Leavenworth in this state, where, being confined by the warden of the prison, in pursuance of such judgment, he brings this application for release on writ of habeas corpus.

The warden has filed his response and the matter is now before the court for decision.

The question presented is, does the indictment or any count thereof found against petitioner charge him with a violation of any law of this Government? If not it is quite clear the court had no jurisdiction. The plea of guilty interposed by petitioner to such indictment admitted no wrong or guilt on his part and the sentence imposed against him is void.

On a former hearing it was attempted to be made clear if an indictment absolutely fails to charge any public offence the court to which it is presented has no jurisdiction. See, *In re Coy*, 127 U. S. 731; *Ex Parte Parks*, 93 U. S. 23; *Roberts* v. *Riley*, 116 U. S. 80; 12 R. C. L. p. 1203.

The charges attempted to be preferred against petitioner herein in the indictment returned against him are the offenses of counterfeiting in whole or in part a "note, bond obligation or other security" of a foreign country, the Dominion of Canada. While the indict-

ment does inferentially charge petitioner with the counterfeiting of an alleged security of the Candian Government, yet the indictment further proceeds to specify and describe with minuteness the instrument alleged to have been counterfeited by petitioner. Hence it becomes a question of law whether the falsely making, uttering or other counterfeiting of such an instrument as is described is an act done in violation of the provisions of Section 161 of the Penal Code under which he was indicted. It is quite evident by Section 161 of the Penal Code the Congress did not attempt to afford protection against or to punish the counterfeiting of all and every class of papers, tokens or documents made up or printed by or in a foreign government, but alone to securities or obligations of such countries or a bank or corporation located therein. The question presented in its last analysis here is:

Do the inland excise stamps described in the indictment fall within the class of documents named in the statute as a "note, bond, obligation or other security"? If this question related to an instrument of this government, the answer would be easy to find for the Congress has by law arbitrarily defined in what securities or obligations of this government consist, as follows:

> "Section 147. The words 'obligation or other security of the United States' shall be held to mean all bonds, certificates of indebtedness, national-bank currency, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts

> for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any Act of Congress."

However, the Congress has not attempted to define in what the "notes, bonds, obligations or other securities" of foreign governments consist. Section 220 of the Penal Code was enacted for the purpose of making it an offense to counterfeit the postage stamps of a foreign government. The inland excise stamps described in the indictment cannot in any sense fall within that statute. Therefore, as there is no statutory definition of the term "note, bond, obligation or other security" employed in Section 161 of the Penal Code, and as a mere stamp or receipt does not in my judgment fall within the commonly accepted meaning of the term "note, bond, obligation or other security" I am of the opinion the indictment alleges no public offense against petitioner as to either or any of its counts. While perhaps this court will not take judicial notice of the laws of a foreign country, and while it was within the power of the Canadian Government by arbitrary law to have defined in what its "notes, bonds, obligations or other securities" should consist, a search of the laws of that country reveals no act making such arbitrary definition of such terms.

While I find no adjudicated cases in point an examination of the opinions of the Attorney-Generals on kindred or like subjects aid me in arriving at the view of the matter here taken. See, 14 Op. Atty. Gen. 528;

21 Op. Atty. Gen. 136; 22 Op. Atty. Gen. 40; 26 Op. Atty. Gen. 231.

I am of the opinion the writ prayed must go, on such terms as to bond as this court, on application, shall prescribe.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas,
April 20th, 1922.

A true copy; attest:

F. L. Campbell, Clerk,
(Seal) By C. B. White, Deputy.

BIDDLE, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS, *v.* LUVISCH.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 96. Argued October 21, 1924.—Decided November 17, 1924.

A certificate from the Circuit Court of Appeals should submit definite questions of law arising upon the record and not send up in effect the whole case. Only substantial matters in approved form should be so presented.

Certificate dismissed.

CERTIFICATE from the Circuit Court of Appeals asking instructions, in a case of *habeas corpus* appealed to it from the District Court. The body of the certificate is given below in a footnote.[1]

[1] The appellee had been indicted in the District Court of the United States for the Eastern District of Michigan in three counts, to which he entered a plea of guilty, and thereupon was sentenced to confinement in the United States Penitentiary at Leavenworth, Kansas, for five years. While in prison he applied to the District Court of the United States for the District of Kansas for a writ of *habeas corpus*, and upon a hearing of the petition a judgment was entered discharging him from imprisonment on the ground that none of the three counts in the said indictment to which he had entered a plea of guilty and was sentenced, constituted a violation of any law of the United States. Each of the three counts is based upon the same facts, except that the first count charges the making of a plate to be in the likeness and similitude of certain plates designed by the Dominion of Canada, a foreign government, for the printing of the genuine issues of certain obligations and securities of said Government. The second count charges him with possession of that plate, and the third count charges him with the sale of 1,200 counterfeit prints from said plate in the likeness and similitude of the genuine obligations and securities of that foreign Government. The description of these securities and obligations of the Dominion of Canada is set out in each count, and for this reason we deem it

Mr. Assistant Attorney General Donovan, with whom *Mr. Solicitor General Beck* and *Mr. Harry S. Ridgely* were on the brief, for Biddle, Warden.

Mr. I. J. Ringolsky, with whom *Mr. L. S. Harvey, Mr. M. L. Friedman* and *Mr. Wm. G. Boatright* were on the briefs, for Luvisch.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This certificate fails to meet often announced requirements and must be dismissed. It does not submit one

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only necessary to set out the first count of the indictment, which differs from the other counts only as stated. That count, omitting the jurisdictional allegations, charges that the defendant "did then and there unlawfully, wilfully, feloniously and knowingly, and without lawful authority, cause and procure to be made and engraved a certain zinc half-tone plate in the likeness and similitude of certain plates and impressions designated by a certain foreign government, to wit, the Dominion of Canada, for the printing of the genuine issues of certain obligations and securities of the said foreign government, to wit, certain inland excise stamps of the denomination of one cent, bearing the following words and figures, to wit: The numerals '1912' at each end and in the center of said stamp, and the words 'Certified manufactured in the year'; and the signature of, to wit, 'J. W. Vincent,' and a large scroll numeral '1,' all on the left side of the center of said stamp, and in the center thereof the word 'Ottawa' above the numerals '1912,' and beneath said numerals the word 'Canada,' and on the right of the center of said stamp appears first the word 'cent' and then 'bottled in bond under excise supervision, Deputy Minr. Inland Revenue.'"

It is further certified that the following question of law is presented by the appeal prosecuted by the warden of said penitentiary, the respondent in the court below, the decision of which is indispensable to a determination of the case, and to the end that this court may properly discharge its duty, it desires the instruction of the Supreme Court upon it:

Do the counts of the indictment, or any of them, charge the commission of a criminal offense against the United States as in violation of §§ 147 and 161 of the Act of March 4, 1909 (35 Stat. 1088) known as the Penal Code of 1910?

or more definite questions of law arising upon the record but, in effect, asks decision of the whole case. *Waterville* v. *Van Slyke*, 116 U. S. 699, 700, 704; *Jewell* v. *Knight*, 123 U. S. 426, 433; *Cross* v. *Evans*, 167 U. S. 60, 63, 65; *United States* v. *Union Pacific Ry. Co.*, 168 U. S. 505, 512, 513; *Chicago, Burlington & Quincy Ry. Co.* v. *Williams*, 205 U. S. 444, 452; *Hallowell* v. *United States*, 209 U. S. 101, 106, 107.

The constantly increasing demands upon us make it highly important that only matters which are both substantial and in approved form should be presented.

Certificate dismissed.